

Accountability of Transnational Corporations in the Developing World: The Case for an Enforceable International Mechanism

Abstract

Purpose: This paper contends that the dominant voluntarism approach to the accountability of Transnational Corporations (TNCs) is inadequate and not fit-for-purpose. It argues for the establishment of an international legal mechanism for securing the accountability of TNCs particularly in the context of developing countries with notoriously weak governance mechanisms to protect all relevant stakeholders.

Design/methodology/approach: The study adopts insights from the fields of management and international law to draw out synergies from particular understandings of corporate governance, corporate social responsibility and international human rights. The governance challenges in developing countries with regard to securing the accountability of TNCs is illustrated with the Nigerian experience of oil-industry legislation reform.

Findings: The specific context of the experiences of developing countries in Africa on the operations of TNCs particularly commends the need and expedience to create an international legal regime for ensuring the accountability of TNCs.

Originality/value: Mainstream research in this area has focused mainly on self and voluntary models of regulation and accountability that have privileged the legal fiction of the corporate status of TNCs. This article departs from that model to argue for an enforceable model of TNC accountability based on an international mechanism.

Keywords: Transnational companies; Accountability; Corporate governance, Corporate and social responsibility; International Criminal Court

Paper Type: Research Paper

Introduction

The accountability of Transnational Corporations (TNCs) remains an issue of global concern (Frynas, 2010; Jamali, 2010b p. 183). There are grave concerns that those at the helm of affairs in TNCs are engaged in a race to the bottom through ruthless pursuit of the profit maximisation objective (Kapstein, 1999). Others argue that corporate social responsibility (CSR) is entirely compatible with long-term profitability (Garriga and Mele', 2004). The enactment of notable Corporate Governance (CG) codes such as the United Kingdom's Combined Code 2006 now replaced by the UK Corporate Governance Code 2012; the United States' Sarbanes-Oxley Act 2002; CG standards, principles and guidelines being championed by supra-national authorities such as the OECD and the World Bank (Van den Berghe, 2001) have done little to ensure the accountability of TNCs on a global basis. Yet, the dominance of TNCs in the global economic sphere continues apace. Recent accounts indicate that the current normative underpinnings of corporate governance (CG) and CSR are not directed at addressing accountability deficits and excesses of TNCs. This is even more so in the context of developing countries (Jamali, 2010a and 2010b) and in Africa in particular (Omoteso, 2011; Yusuf, 2008).

In the last two decades, there has been increased research interest in the activities of TNCs and their subsidiaries abroad especially within the developing world owing to some high profile human rights abuse cases against TNCs. Such cases include *Wiwa et. al v Royal Dutch Shell*, *Kiobel v Royal Dutch Shell* (environmental degradation and complicity in unlawful killings in Ogoniland, Nigeria), *Bodo v Shell* (environmental degradation in Ogoniland, Nigeria); *Saleh, et al. v. Titan, et al.*, *Al Shimari v. CACI* (torture of prisoners), *Presbyterian Church of Sudan et al v. Talisman Energy, Inc.* (allegation of aiding and abetting Sudanese government in torture in South Sudan); the Bhopal cases (leakage of toxic gas from a pesticide plant run by a local subsidiary of US firm Union Carbide).¹ Assessing the potentials of the UN's Protect, Respect and Remedy framework (the framework) on corporations and human rights, Fasterling and Demuijnck (2013) emphasised the moral commitment of corporations as a precursor for the framework's 'human rights due diligence' requirement. They identified 'limits of pragmatic approaches to coping with business-related human rights abuses' to make a case for a meaningful 'international and extraterritorial human rights law'. Similarly, Seppala (2009) examined the effectiveness of the three most recent UN initiatives on TNCs and human rights regime: the 'Norms on the Responsibilities of Transnational

Corporations and Other Business Enterprises with Regard to Human Rights’; the Global Compact; and the work of the UN Special Representative on Business and Human Rights (all of which are germane to this current work and will be further discussed below) and concluded that states remain the primary bearers of human rights obligations despite these initiatives. In addition, based on the current governance gaps that allow Transnational Corporations (TNCs) to carry out ‘blameworthy acts’ with impunity, de Jonge (2011) presented a two-part model that advocate the need to evolve and adapt international law in a way that both holds TNCs responsible for human rights abuses resulting from their business activities and provides remedies to the victims of these abuses. This article builds on this emerging case for an enforceable international legal regime for the accountability of TNCs in the light of their current power and influence.

The contemporary experience of TNCs’ external stakeholders in developing countries, specifically their host communities and governments, demands an enforceable international mechanism for achieving TNC accountability. Since TNCs have, and continue to benefit immensely from international law which protects their property rights and contractual interests, they ought also to be accountable through international law. This is particularly important as their clout usually undermines the institutions of governance in developing countries with notoriously weak governance mechanisms to protect all relevant stakeholders. This study adopts insights from law and management to draw out synergies from particular understandings of corporate governance, corporate social responsibility and international human rights to propose an enforceable international legal mechanism for securing the accountability of TNCs. CG, CSR and international human rights share strong bases in the principles of ethics, equity, fairness, justice and fair play among relevant actors.

The next section sets out the theoretical foundation of the paper; the convergence of CG, CSR and international law, particularly human rights, to underpin our discussion of the accountability of TNCs. The third section maps prevailing governance approaches and the immense economic and political clout of TNCs as well as the effectiveness of the regulatory regime of TNCs. Section 4 focuses on the experience of the operations of TNCs justifying a shift from the current dominating regulatory regime through an empirical focus on Nigeria, a typical developing country. Section 5 sets out the case for a broadened approach to accountability of TNCs in light of their immense power and actual and potential capacity for impunity. In this regard, we argue that the current situation of impunity for gross violations of

human rights by TNCs justifies conferring jurisdiction on a supranational accountability mechanism like the International Criminal Court (ICC) to deter corporate malfeasance. The article concludes on the note that continued resistance of TNCs to accountability is not a positive issue for their continued legitimacy as global actors, draws out the implications of an enforceable international mechanism for both TNCs and their stakeholders and identifies possible areas for future research.

CG, CSR, Human Rights: A Framework for Accountability of TNCs

Aras and Crowther (2009) have stated that ‘more enlightened’ corporations recognise a ‘clear link’ between CG and CSR. Others like Clarke and Klettner (2009) similarly emphasise how CSR mainstreaming is rapidly becoming the norm in corporate strategy design, deriving from ‘greater recognition of a direct and inescapable relationship between corporate governance, corporate responsibility, and sustainable development’ (Clarke and Klettner, 2009: p. 269). These views suggest the emergence of a new paradigm in corporate governance research which considers corporate governance, CSR and human rights to be inseparable as they have their roots in principles such as ethics, fairness, equity, accountability, responsibility, responsiveness and sustainability. These principles should enable organisations to give an appropriate consideration to the interests of other stakeholders while pursuing long term corporate prosperity.

Garriga and Mele´ (2004) and Mele´(2008) have identified four contemporary theories of CSR. First is the ‘corporate social performance’ theory which is based on a sociological approach. On this approach, business has responsibilities that extend beyond wealth creation. It should be concerned with the consequences of its activities and also carry out ethical and philanthropic activities to benefit society by paying attention to social expectations. The second is ‘shareholder value’ theory which holds that the only CSR of business is making profit for its shareholders. This is also referred to as ‘fiduciary capitalism.’ It is the basis of neoclassical economic theory which is centred on profit maximisation for shareholders. The third is ‘stakeholder’ theory. On this view, the corporation has responsibilities to all those who have a ‘stake’ in its activities. This would include not just shareholders but individuals and groups like its staff, host community, clients/consumer, among others. The corporation is obliged to combine its objective of profit with the legitimate interest of all its stakeholders.

The fourth is ‘corporate citizenship’ which is sometimes taken to be a substitute term for CSR. However, it refers to the broad notion that the corporation is a part of society and it is expected to actively engage in acts that promotes human welfare and wellbeing like any other citizen or member of society.

The United Nations’ recently agreed Sustainable Development Goals (SDGs) reflects the state of the contemporary discourse on the integrated and indivisible nature of all human rights and the overriding aim of sustainable development.² The SDGs emphasise the need to ‘balance’ the three dimensions of sustainable development: the economic, social and environmental elements in every society and country. Among others, the SDGs seek to ‘promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.’ An aspect of this goal is to ‘promote the rule of law at the national and international levels and ensure equal access to justice for all.’³ This particular aspect of the SDGs is particularly relevant here as it aligns closely with the discussion of effective measures to secure the accountability of any global actor, including TNCs. Equally relevant is the reference to a ‘global partnership’ for the implementation of the ambitious and wide-ranging commitments in the SDGs which include an important role for private business, including TNCs.⁴

Dominance, Governance and Regulation of TNCs - Power and (In) Glory

It is apparent that TNCs are playing a dominant role not only in the global economic but also, political arena. Worse still, some governments (or principal officers of the state) have been found to connive with TNCs in corrupt practices at the expense of the wellbeing of their host communities. This is especially the case in Africa (Szeftel, 1998; 2000; Kofele-Kale, 2006) and Asia (Ngo, 2008; Choi, 2007; Javaid, 2010).

TNCs, Violations of Human Rights and Abuse of Power

TNCs have a record of human rights violations and other forms of abuses of power, including bribery and environmental degradation in different parts of the world, which have mostly gone unchecked especially in developing countries. The Business and Human Rights Resource Centre website (<http://business-humanrights.org/>) provides extensive documentation on the issue. A few instances of rights violations and abuse of power by TNCs demonstrates the point. There is the 3rd December 1984 accident at the pesticide plant of the

mainly United States owned Union Carbide India Limited (UCIL) in Bhopal, India. The host community suffered extensive violations of the right to life as well as loss of very significant properties from major operational lapses in the plant. The major issue was the escape of methyl isocyanate (MIC) and a host of other toxic gases from the company's operations plant (Mendes 2014: 179-183). The gas caused environmental damage, impairment of health, and according to some accounts over, 20,000 deaths to date (Green Peace USA 2004; Mendes 2014: 179). More than three decades on, efforts to secure justice for what has been described by some as the worst industrial disaster in human history, has continued with much dissatisfaction on the part of victims. Most of the victims' efforts to seek redress in the United States against Union Carbide (the parent company), for negligence under the Alien Torts Statute (ATS) have been aborted on technical grounds. Though Union Carbide (now taken over by Dow Corporation) has paid \$470 million to the Indian government for the victims, most of the victims remain frustrated with the compensation arrangements which have been deemed grossly inadequate by victims who are seeking about \$3 billion (Green Peace USA 2004; Mendes, 2014: 180).

In June 2004, 256 former Iraqi prisoners filed a case against American corporations, CACI International and Titan Corporation (now L-3 Services, part of L-3 Communications) in the United States federal court. The two companies were contracted by the government of the United States for the purpose of interrogating detainees and provision of translation services at military prisons in Iraq. The former detainees at Abu Ghraib prison brought claims against the two companies for directing and participating in torture, war crimes, crimes against humanity, sexual assault, and cruel, inhuman and degrading treatment during their detention. The claimants alleged they were raped, subjected to repeated beatings, solitary confinement, urinated on, prevented from performing their prayers and forced to watch their family members being tortured. They claimed the defendant companies had been negligent in the way they hired and supervised employees who worked for them in Iraq. A number of other detainees have followed suit bringing similar claims against both companies but with the same result that the claims have been dismissed on the basis that the companies are covered by sovereign immunity since they were working for and under the supervision of the United States military (Business and Human Rights Resource Centre).

In a bid to stem the tide of TNC's ruthlessness in their pursuit of profit maximisation and entrench sustainability of both the TNCs and all its stakeholders, governments and supra-national authorities have been in the forefront of establishing corporate governance codes. Although most countries have adopted these codes (as applicable), such adoption has not resolved ongoing shareholder-stakeholder debates (Clarke and Klettner, 2009: p. 269). Consequently, there is a need for an enforceable international legal mechanism that broadens the scope for TNCs' accountability beyond the regulation mode which has so far dominated its governance.

Regulation of TNCs - Voluntarism: Past, Present, and Future?

As a result of the political and economic control of the international system, the dominant but gradually shifting regulatory regime for the activities of TNCs centred on corporate governance and CSR. CSR clearly recognises the need for corporations to be socially responsible citizens cognisant of the interests of broader stakeholders like host communities and states in the conduct of their affairs (Beltratti, 2005). However, CSR has its limitations in the face of expanded powers and influence of TNCs and the real or potential impact on their environment conceived here to include the host state, host community and the physical environment. Jenkins has noted how the dominant presence of corporations as vanguards of CSR has had a major impact on it; leaving out as much as it includes (Jenkins 2005: 528). Banerjee draws attention to how practices of CSR suggest that it has developed into 'an ideological movement designed to consolidate the power of large corporations' (2008: 59). This is likely connected with the managerialist, as opposed to emancipatory, origins of CSR (Banerjee, 2008: 74). Others like Frynas (2010) contend that CSR is not only inadequate for addressing governance challenges but it may actually contribute to governance failures. Yet, business organisations, especially TNCs, have consistently employed CSR to prevent the introduction of 'mandatory international regulation' of their activities. The basic premise of that position is that CSR reflects the commitment of business to voluntary responsible behaviour and any attempt to introduce a mandatory regulatory regime will jeopardise 'this goodwill' (Pendleton, 2004).

Increasingly, the hitherto well-rehearsed position that international law applies only to states and not individuals, and certainly not *the corporation* has lost normative steam. The United Nations, since the 1990s has signalled this in incremental steps even though these have

remained less than satisfactory. One such step was the introduction of the United Nations Global Compact in 2000 (UN Compact). This now contains ten principles in the areas of human rights, labour, the environment and anti-corruption derived from four major international instruments on these issues.⁵ However, notwithstanding the visibility of the UN Compact, it is not even a regulatory instrument but rather, 'a voluntary initiative' which places reliance on 'public accountability, transparency and disclosure' as a 'complement' to regulation (UN Global Compact Office, 2011: p.1). It is easy to see that the UN Compact directed at 'corporate sustainability' though endorsed by over 8,500 signatories in over 135 countries, holds little promise for accountability of TNCs (Koenig-Archibugi, 2004). Notwithstanding the handicaps of the UN Compact, it does denote recognition within the international system for addressing the activities of TNCs for global well-being.

Another relevant step was the draft *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Norms)*⁶ proposed by the Sub-Commission on the Promotion and Protection of Human Rights, an expert subsidiary body of the then Commission on Human Rights (CHR) in 2003. It was highly contentious at the time because it attempted to impose on TNCs the same duties states had for human rights under international law. It suffices to mention just a part of Article 1, the 'general obligation' provision since it sets the tone for the *Norms* as a whole. After reaffirming state responsibility for human rights under international law, it states that within their 'spheres of activity and influence,' TNCs (and other enterprises) have an

obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.

This arguably progressive approach failed to gain the support of businesses and governments though it was fully backed by some human rights groups (Backer, 2005; Weissbrodt, 2005/2006). Its implementation was eventually dropped by the erstwhile CHR. Despite the rejection, the CHR requested the UN Secretary-General to appoint a Special Representative to move beyond the stalemate and clarify 'the roles and responsibilities of states, companies and other social actors in the business and human rights sphere' (Ruggie 2011: p.1), hence the appointment of Professor John Gerard Ruggie with this mandate. Ruggie presented his final report to the Human Rights Council (HRC) in March 2011 which unanimously adopted

the Guiding Principles (Ruggie, 2011) annexed to the report on 16 June 2011. The Guiding Principles represents the current official international normative regime addressing the expectations and obligations of stakeholders regarding the activities of TNCs. The focus on human rights is premised on the view that it is arguably the most acute arena in which the impact of TNCs power is felt.

On the face of it, the Guiding Principles appear to represent a quantum leap forward in seeking to address the impact of business on human rights and especially the responsibility of TNCs. Adopting what has come to be recognised as the standard of the United Nations system in the area of human rights; ‘Respect, Protect and Fulfil’ Framework, it restates the duty of states to ensure respect for human rights by business enterprises within their jurisdiction and where applicable, even extra-territorially. This is particularly relevant in the context of recognition that accountability through a human rights compliant regime in contrast to other forms (principally CG and CSR) appears so far, to hold the best promise for accountability of TNCs as a key constituent of global governance organisations. While CSR initiatives have been undertaken selectively, a human rights approach requires business enterprises to respect every type of human rights rather than a selection of issues they feel comfortable with. Thus, ‘a human rights framework provides a universally recognised, people-centred approach to companies’ social & environmental impacts’ (Business and Human Rights Resource Centre 2015).

However, the Guiding Principles remain a ‘guide’; principles which are of a non-binding character. As Amerson points out, while Ruggie’s work ‘is transformational, it is still incomplete’ as victims of rights violations by TNCs who lack the means to obtain redress at the domestic level are not able to do so through international law (Amerson, 2012). The most that can be said for the Guiding Principles is Ruggie’s candid submission that their normative contribution is not the creation of new obligations for business under international law but the elaboration of existing standards (Ruggie, 2011: p. 5). In short, Ruggie’s work constitutes a ‘restatement’ of the (recently slightly modified) classic position regarding non-state actors in international law; that in practice, they are mostly able to get away with violations of human rights (even gross ones) on the pretext that only states are the subject of international law. Ruggie also anticipates further developments in terms of the need for taking on the challenge of mitigating the impact of TNCs (and business generally) on human rights.

The Guiding Principles remain a perpetuation of what has been a recognised fact on forms of global accountability arrangements namely that they are commonly liable to serving the purposes of strong ‘constituents’ like ‘major governments and large corporations’ (Scholte, 2011). It is to be argued that even at the point of developing the Guiding Principle, there were sound policy reasons for moving beyond the voluntarism approach underlying them. Many others have called for dropping voluntarism or at least supplementing it with an enforceable legal regime (Muchlinski, 2001; Simons, 2004). Reliance on moral force for the actualisation of the Guiding Principles as far it relates to TNCs is problematic as the experiences of developing countries demonstrate.

TNCs and Policy Capture in Developing Countries - The Case of Nigeria’s Oil Policy Reforms

A poignant example of the nature and impact of the policy capture of TNCs – their ability to shape and control governance and state action - in developing countries is their resistance to current efforts to bring about reform in the operations of the oil and gas industry in the country. The country’s oil and gas legislation had not been revised and the regulatory bodies have become inefficient and corrupt due to lack of comprehensive reform since the beginning of oil exploration in commercial quantities in 1958. Nigeria’s Petroleum Industry Bill (PIB) emanated from the report of the Oil and Gas Reform Implementation Committee (OGIC) established by the Federal Government in 2000 with a mandate to carry out comprehensive reform of the oil industry.

The PIB, conceived as an ‘omnibus legislation’ for establishing ‘clear rules, procedures and institutions for the administration of the petroleum industry in Nigeria’ (Lukman, 2009: p.4), is intended to align the country’s oil and gas industry with current global best practices (p. 16). The principal objects of the reforms are to institute transparency, address environmental concerns, check corruption, improve revenue collection, optimize local content, streamline and strengthen regulatory institutions in the sector. The reform process is directed at moving the country’s oil sector from being ‘one of the most opaque’ in Africa, to ‘one of the most open and transparent in the world’ (Lukman, 2009: p.4). But the reform effort has been stoutly resisted by transnational oil corporations (TOCs) operating in the country.

Expressing their discomfiture with the proposed legislation which seeks to reduce the dominance of transnational oil corporations and presumably their profits, oil exploration

giants in the country, notably Shell and Chevron have threatened the move could lead to the country losing over \$50 billion investments in the sector (Rowell, 2010; Alike, 2012). The PIB has had a chequered history since it was first introduced in the country's federal legislature in 2008 and remains a bill through the administration of three presidents from the same party. It has been revised at least five times (and is under further review) due to pressures from a number of quarters; including political actors ostensibly championing regional interests in the country (Thurber et al., 2011)⁷ but principally, 'vested interests of key players in the oil industry' notably, the TOCs (Salaudeen, 2013). The fate of the PIB remains uncertain. This experience is not unique to Nigeria but common in many developing countries. Such level of influence and immense power of TNCs needs to be made accountable and in an effective manner too.

While TNCs-lobbies and influence exist everywhere, it is more difficult for them to trump public weal and democratic principles in the home states of the TNCs, especially in developed western countries. Many of the TNCs' home states, usually OECD countries which have been in the vanguard of voluntarism, have over time developed strong institutional and legal regulatory arrangements based on deliberative democratic participation. These serve as important, even if not completely effective checks on TNC power and influence over society as a whole and governance in particular. With the deficient institutional capacity of developing countries, the lopsided power equation between TNCs and resource-rich developing countries suggest the need for a balancing and accountability mechanism. A mandatory, internationalised legal regime is *sine qua non* to maintain a balance in the power relations between TNCs and stakeholders and secure the accountability of the former.

TNCs in Developing Countries: The Case for an Enforceable International Mechanism for Accountability

The *Norms* earlier mentioned, challenged the 'dominant conceptual matrix—a private law model based on national regulation focused on state-sanctioned economic amalgamations of power that ultimately serve one class of stakeholders, the shareholders, above all others' (Backer, 2005: p. 192). As earlier sections of this article have sought to show, the interest, power and influence of TNCs on governance and what is arguably their insensitiveness to the

plights of other stakeholders remain an important part of the governance crucible in the developing countries in particular. The excesses of TNCs seem to continue unabated in spite of the continuous review of and updates to various CG codes across the globe. This section attempts to chart a course for curtailing the excesses of TNCs based essentially on the premise of international human rights law. This is premised on the position that ‘it may well be the case that further legislative and regulatory intervention will be required to ensure all corporations fully respond to the growing public demand that they recognize their wider social and environmental responsibilities’ (Clarke and Klettner, 2009: p. 270).

It is relevant at this point to briefly explain the justification for recourse to human rights as a mechanism for securing accountability of TNCs. International human rights law has become a critical feature of the attempts to restrain state power in view of the gross violations of human rights committed during World War II.⁸ It is clear that the absence of international restraints leaves the powers of states unchecked and provides a licence for impunity including the commission of war crimes and crimes against humanity. It is the reality that TNCs have continued to seriously challenge the traditional ‘economic and political dominance of governments’ (ICHRP, 2002: p. 9) As a result, TNCs can (and do) directly and indirectly threaten and violate human rights of citizens across the global through their operations. It is apposite that TNCs be equally reigned in through the same mechanisms designed to constrain the ability of states to legitimately impugn on human rights of their citizens. The International Council on Human Rights and Policy (ICHRP, 2002) states the case for international human rights appropriately in this regard:

Just as human rights was initially developed as a response to the power of states, now there is a need to respond to the growing power of private enterprise, which affects the lives of millions of people around the world (p. 10).

For the exercise of power to be effective and legitimate, it must be accountable and this is the case also with accountability of TNCs especially in their historical position as a frontier of global governance (Scholte, 2011: p. 10 -11). Global governance organisations are those bodies, institutions or agencies whose activities have far reaching impact on the enjoyment of ‘global public goods’ (Scholte, 2011). As a result, accountability of global governance organisations is an imperative rather than ‘an optional extra.’ (Scholte, 2011: p. 15).

Scholte has defined accountability from a critical global governance context to mean the need 'to constrain power and make it responsive to the people that it affects, including in particular people who tend otherwise to be marginalised and silenced' (Scholte, 2011: p. 15). On this account, accountability goes well beyond the 'good-governance' notion with its emphasis on cost-effectiveness; financial probity and effective performance (Scholte, 2011: p. 15 - 16). This understanding of and approach to accountability is adopted in this discussion as it is apt for the context of TNC operations and their impact in developing countries. This is because such countries meant to regulate the activities of TNCs are usually ruled by governments which are weak and often times corrupt. In such countries, host communities are notably socially disenfranchised and lacking a voice; suffering but voiceless communities. Further, we agree with Scholte that notwithstanding the various notions of the definition of accountability, there is consensus on the position that its main concern is a process whereby 'actors'; like TNCs, are required to provide 'answers' to those their actions affect. Of course the point of contention in this context (as with others) remains defining who constitute that constituency of impact.

Traditional notions of business organisations suggest a very restricted purview of accountability. Over four decades ago, Milton Friedman famously argued that corporations could not be said to have 'responsibilities;' suggesting that at best, corporations have a much restricted duty of accountability. Friedman maintained that the social responsibility of business is to make profit with its stakeholders identified as the promoters and shareholders. Except as 'a matter of pure rhetoric,' even corporate executives cannot be said to have 'social responsibility' as that would amount to an expectation that corporate executives are required to act in a manner contrary to the interest of their employers (Friedman, 1970).

Friedman's position assumes that corporate governance is adequate normatively and operatively for the management of the affairs of corporations. Further, the notion of 'social responsibility' is achieved at the expense of the owners or promoters of corporations. It is safe to assume that many now disagree with Friedman's position which dominated the operational and managerial philosophy of TNCs. As the Hammer and Lloyd have noted, the circumstance of the global economic crisis has revealed 'gaping holes' in the exclusive CSR, self-regulation approach to corporate governance. This is because 'ensuring accountability is not about developing high visibility promoting compensatory activities, however valuable

they are in themselves, but about preventing systemic failures and external harm in the first place' (Hammer and Lloyd, 2011: p. 11).

A number of salient factors justify a more robust approach to the corporate governance regime for managing the accountability of TNCs in developing countries in particular. The globalised reach of the TNCs, their trans-national status, their financial clout in an era of *neo-liberal* trade, their influence on state policy across a spectrum of state functions and responsibilities all commend a concerted effort at a regime of accountability that transcends the state. An internationalised legal regime is required if the well-being of the vulnerable in societies and states in which they operate truly matter. In addition to existing measures dominated by voluntarism, it is logical to advocate a coercive international legal mechanism for the regulation of TNCs. In the domestic sphere, mainly in developing countries, existing mechanisms for regulating the activities of TNCs are usually subject to considerable influence. Such mechanisms are often outdated, weak or generally open to, and are actually habitually manipulated by TNCs directly or through proxies in developing countries.

The current state of affairs justifies a supranational accountability mechanism like the ICC (Clapham 2008). However, in advancing the case for prosecuting TNCs for gross violations of human rights by the ICC, establishing the basis of corporate liability is a major challenge. This is due to the fact that criminal law traditionally developed around natural as distinct from a 'legal' person. The consensus on the nature of the development of criminal law theory in this regard is that by the time 'corporations became significant social and economic actors, criminal law had already absorbed ideas of individualist rationality and moral autonomy' (Wells 2010: 194). There is also the neoliberal attitude (arguably an ideological bias) which extols the benefits of corporate power while (re) constructing the harm caused by corporations as marginal or even inevitable (Tombs and Whyte: 2015). On this account,

companies could be regulated, but they were not 'real' criminals. They might avoid tax but they were not fraudsters, for example. They might cause death to their workers or to the public, but this was a price to pay for legitimate commerce (2010: 197).

Combining the neoliberal attitude with the limitation that the corporation cannot be imprisoned, critics of corporate criminal liability challenge the value of recourse to criminal law for extracting accountability of corporations (Khana, 1996).

At a conceptual level, the challenge of instituting corporate criminal liability is embodied in the reality that while corporations act only through natural persons, their operations and activities are conducted within complex hierarchies, structures and processes. Critiques of corporate liability maintain that the corporate structure makes it difficult to establish intent and by extension, individual culpability, a basic tenet of criminal law. This reality makes it somewhat difficult to forge a link between the corpus of criminal law and the corporation (Donaldson and Watters 2008:1; Colvin 1996; Bucy 2007). However, as Justice Posner observed in *Flomo v Firestone*, resistance to corporate criminal liability is eroding. There is substantial evidence that criminal liability of the corporation is gaining reasonable ground (Donaldson and Watters 2008)

Simply because criminal prosecution of corporations has not taken hold as a universal norm does not justify continuing resistance to it. Corporate bodies are liable for criminal offences in various domestic jurisdictions. Legislative developments in some national jurisdictions and the international system including the ICC, arguably present favourable conditions for articulating criminal liability of TNCs for gross violations of human rights and other grave abuses. The view that it is inappropriate to seek accountability of TNCs through ‘penal concepts of criminality’ (de Jonge 2011a: 162) does not appear to have taken into consideration the current state of the law regarding corporate liability in some domestic jurisdictions; especially in developed countries like Australia, the United States and the United Kingdom, which could usefully inform the design of the ICC jurisdiction over TNCs.

More than any other, Australia appears to be one jurisdiction that boldly bears out the view that resistance to corporate liability is not as strong as it used to be. In Australian criminal law, the challenge of grounding corporate criminal liability has been substantively addressed by the development of the organisational liability model. This is evident particularly in federal (Commonwealth) legislation. The Australian Criminal Code (ACC) makes express provisions for corporate criminal liability. General principles of corporate criminal responsibility for offences contained in the ACC states in part that its provisions ‘applies to bodies corporate in the same way as it applies to individuals.’ The application is with specific

modifications set out in the ACC and ‘such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.’⁹ The ACC also provides that ‘a body corporate may be found guilty of any offence, including one punishable by imprisonment.’ Section 4B of the Crimes Act 1914 allows for a fine to be imposed for offences that only specify imprisonment as a penalty.

The organisational model of liability is based in part on ‘corporate culture’ or what Bucy has also referred to as ‘corporate ethos’ (Bucy 1991). Section 12 (3) of the ACC provides that where there is a need to prove intention, knowledge or recklessness as a fault element in relation to a physical element of an offence, this fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence. The means of establishing such authorisation by, or permission of, the corporation includes proving that a ‘corporate culture existed within the body corporate that directed, encouraged, tolerated or led to noncompliance with the relevant provision;’¹⁰ or that the corporation ‘failed to create and maintain a corporate culture that required compliance with the relevant provision.’¹¹

The organisational model of corporate liability holds very important promise for overcoming the peculiar structure of the corporation with regard to establishing liability for acts or omissions that cause harm to victims. The model addresses the interaction and relation between the corporation and its employees as well as agents more directly than the traditional approach which relies essentially on ‘lifting the corporate veil.’ As the foregoing provisions indicate, the model holds corporations directly liable in circumstances where features of the organisation of the corporation, including its ‘corporate culture’, directed, encouraged, tolerated or led to the commission of the offence. This model, ‘arguably the most sophisticated model of corporate criminal liability in the world’ (Clough and Mulhern 2002: 198) should be adopted by a supra-national or international court like the ICC in dealing with cases involving TNCs as proposed here.

The choice of the ICC is apt because it was established to check impunity perpetrated under the guise of conflict (Lee, 1999: p. 1 – 2). This is despite the existence within every national jurisdiction now State Party (and non-State) to the 1998 Rome Statute of the ICC (Rome Statute, 1998) of a criminal justice system that could try the offences designated as international crimes under a plethora of international instruments. As Lee pointed out,

motivation for the creation of the ICC came directly from the inability or unwillingness of states to apply the relevant national and international laws to check impunity (Lee, 1999: p. 1). Interestingly, the recognition of national competence in that regard informs the principle of complementarity which is emphasised in the preamble of the Rome Statute of the ICC and repeated in Article 1 of the Rome Statute (Schiff, 2008: p. 77). As against the principle of jurisdictional primacy, under the principle of complementarity, where the crimes proscribed by the Rome Statute have been committed, states have the responsibility to prosecute for the respective crimes and only a failure, inability or unwillingness to do so triggers the ICC's jurisdiction (Cassese, 2008: p. 336 – 342). This is with a view to prevent impunity in the face of state failure or unwillingness to act as required by relevant national and international laws (Holmes, 1999: p. 41 – 42).

Some have argued against conferring criminal jurisdiction over TNCs on the ICC even while conceding the need to subject TNCs to the regime of international law in light of their immense powers as global economic actors. While recognising the benefits of conferring jurisdiction on the ICC over TNCs, de Jonge argues that there are 'more compelling' reasons against such a move (de Jonge 2011a: 161). She points to the challenges that attended the setting up of the ICC in the first place as well as the ongoing 'controversy' regarding its operations. In light of this, she argues, it would be virtually impossible to secure the expansion of the ICC to cover the accountability of TNCs. Another objection which de Jonge considers even more fundamental is that based on the principles of state responsibility, criminal liability cannot attach to corporate person any more than it can to a state. She argues further that while TNCs should be liable for their 'internationally wrongful actions' it is not appropriate to invoke criminal concepts for the purpose (2011a: 162).

De Jonge's concern about the *real politik* that has trailed the establishment and operations of the ICC are well founded. Some would even argue that the ICC has a legitimacy crisis with reference in particular to its virtual exclusive focus on Africa to the neglect of other situations of impunity in other parts of the world. ICC's lack of focus on western actors in conflicts in the Middle East is a notable example. This at least arguably raises important concerns on its investigative and prosecutorial independence. However, the problems of the ICC in this regard are neither peculiar to it as a judicial or international institution nor are they unsurmountable. Moreover, international and supranational law institutions; including even the United Nations, continue to be focal points for accountability in an era of increasing

incidence of economic and political globalisation. This is also the case with the legal and judicial institutions created by them. The active contestations that have attended international relations and international law have made the international system fertile for progressive development and adoption of norms and measures which had being traditionally considered impossible some decades past. This includes the establishment of the ICC in the first place.

A further issue regarding the use of the ICC is the argument that if the African experience on gross violations of human rights by TNCs grounds the argument for criminal prosecution of corporations, an African judicial forum should be appropriate for redress. Thus, the African Court for Human Rights, rather than the ICC, should be the choice institution for accountability of TNCs. On this view, conferring corporate criminal jurisdiction on the African Court of Human Rights (ACtHR) for violations of human rights committed by TNCs on the continent would fortify the prosecutions of TNCs there against criticism of imperialism. On the face of it, this is a good argument in principle, particularly because the ACtHR is an institution of the African Union with existing jurisdiction over rights violations. So, its jurisdiction on this account only need to be extended to include gross violations of human rights committed by TNCs. However, the main challenge of absence of political will to confront rights violations on the part of African leaders which has characterised its establishment and work makes it an unattractive option. Further, even with such a jurisdiction, the court's decidedly restricted, state-centric rules of legal standing severely limits the opportunities for relevant individuals and communities' access to it. Moreover, the global reach of the operations, impact and influence of TNCs commend adoption of an institution like the ICC with substantial global outlook – even if not current reach–, as the forum of choice.

While corporations cannot be jailed like individuals in criminal proceedings, they can be convicted and fined (and have been heavily fined in the United States for instance) and punished in other ways. There is, for example, the United Kingdom's Corporate Manslaughter and Corporate Homicide Act 2007 which aims at ensuring accountability for grave management failings across a corporate organisation leading to fatality. Under this law, an organisation is guilty of manslaughter if the way in which its activities are managed or organised, causes a person's death and such death amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased. On conviction, a corporate body can be subject to an unlimited fine, ordered to take remedial action and be required to publicise

its conviction. The order on publicising its own conviction is an important penal tool which recognises the possible impact of adverse publicity on its economic activities.

At this point, it is relevant to advert to two other objections raised by critics of corporate criminal liability regarding the sentence of fines following the conviction of corporations. The first is that fines, and especially heavy ones, impact negatively only on the shareholders and is thus perhaps then unjustified. This objection is effectively met by the fact that punitive damages are imposed in civil proceedings to similar effect. The second objection is linked to the response to the first question: since the corporation cannot be jailed and there are punitive damages in civil proceedings, why prosecute? This too can be met by the response that fines arising from criminal proceedings against the corporation constitute a further deterrent to corporate criminality and impunity. As Justice Posner of the United States Court of Appeal pointed out in the recent case of *Flomo v Firestone*,¹² while civil liability may allow for punitive damages, such damages do not serve as the perfect substitute for fines arising from criminal proceedings. A fine could serve as a source of further sanction where the corporation has engaged in fraud for instance yet, it is virtually impossible for victims to prove causation on the facts. Fines in such circumstances 'increase the expected cost of fraud' when it is committed by the corporation.¹³ Significantly too, the 'hands and feet' (directors and senior management) of corporations can be convicted along with the corporation and actually jailed alongside the corporation.

It is arguable that circumstances of impunity and objectives of combating it that led to the establishment of the international criminal justice regime exist with regard to accountability of TNCs particularly in developing countries. During the negotiations for the ICC Statute, there was indeed, a bid to have the criminal responsibility of legal entities which would have included the liability of corporations alongside that of natural persons but this did not scale through ostensibly due to different national legal conceptions of the liability of legal persons. Some jurisdictions did not recognise criminal liability of corporations and this will have implications for the concept of complementarity upon which the Rome Statute was built (Saland, 1999: p. 199). Such inclusion would have strengthened the hands of and provided a viable opportunity for victims of TNC crimes to secure accountability (Chesterman, 2011: p. 323).

Furthermore, at the international level, the concept of personal criminal liability, joint criminal enterprise and command responsibility for international crimes have been very useful for combating impunity. These concepts in the Rome Statute which, as rightly noted by de Jonge, can be applied to officers of TNCs (2011a: 158-161), have considerably enhanced the ability of international law to bring relevant state and non-state actors (including former heads of state and war lords) to justice for international crimes. What is required is the political will, which as noted above, may be tough in securing in view of powerful vested interests. Still, it is reasonable to contend that with persistent advocacy, especially with the diligence of relevant voices like that of conscientious academics and activists, TNCs can be brought under ICC jurisdiction in a not too distant future.

Conclusion

As corporate governance codes continue to enjoy wider acceptance across the world as the ideal mechanism to govern the modern corporation, stakeholders remain wary of the blatant dominance and excesses of TNCs in both the political and economic spheres. We have suggested the need for advertence to an enforceable international mechanism for regulating and achieving broad accountability of TNCs. The empirical experiences of TNCs' external stakeholders in developing countries reinforce the need for recourse to a system of enforceable international mechanism to ensure accountability of TNCs.

There are a good number of reasons for holding TNCs to account for their power through a human rights approach. One is the justification that in the reality of TNCs benefiting immensely from international law; it protects their property rights and contractual interests (ICHRP, 2002: p. 12). They should also be accountable through international law in light of their clout which typically overwhelms the institutions of governance in developing countries (which are often too weak to be effective). While TNCs stand out as a major frontier of power that has so far largely defied effective accountability, ultimately, it is plausible to posit that it will go the way of other formerly inscrutable fronts for securing immunity from accountability. The recent developments in international criminal law with the cumulative institution of universal jurisdiction, creation of crimes against humanity and war-crimes, the diminution of Head of States' immunity and superior command, all point to progressively diminishing frontiers of impunity.

To be sure, conferring jurisdiction on the ICC over TNCs may attract criticism of another imperialist design even conceivably from governments complicit in the abuse and violations of the human rights of their own citizens, particularly in developing countries. This is already an issue with the ICC as mentioned above. However, experience of combating impunity shows that those engaged in impunity challenge even national arrangements and institutions designed or established to regulate and check various abuses. Thus, real or imagined fears of such charges of imperial design should not deter the creation of such a jurisdiction in an international institution. An important strategy for making such jurisdiction viable is to ensure the high integrity of the operators of the relevant institution, in this case, the ICC.

The argument canvassed in the foregoing for the adoption of a human rights-based approach as part of the design for extracting accountability of TNCs is in recognition of the under-realised promise of the human rights corpus for accountability for power. The adoption of a human rights based approach is a progression of the calls for liberating the contemporary human rights movement from simply advancing liberal capitalist economic interests. It is consistent with the position advanced by scholars like Mutua (2001) for the need to utilise human rights for addressing asymmetrical power relations specifically in this case, between Western owned and controlled powerful TNCs and individuals and groups (host communities) in developing countries. In this way, the human rights corpus which is called in service of global capitalism notably through the promotion and legalisation of property rights, is deployed for regulating and combating the excesses of TNCs, a major agent of globalization.

An enforceable international mechanism like the ICC will reduce the pressure on governments of developing countries to find ways to 'right the wrongs' of the TNCs enabling pressure and lobby groups to channel their resources to other productive endeavours. Added to these, such mandatory international mechanism will, in the long run, enhance the reputation of TNCs through closer observance of wider stakeholders' interests. This would, in the medium term or long run increase their profitability. As a follow up to this this article, future empirical research that engages with the potential impacts of a mandatory international mechanism on various TNCs' stakeholders will be invaluable. Future studies could also consider assessing the likely effect of such mechanisms on TNCs that have their roots in socialist economies and theocratic states.

Notes

¹ The details of these and many other cases are available on the website of Human Rights and Business Resource Centre : <http://business-humanrights.org/> and the Centre for Constitutional Rights: <http://ccrjustice.org/>

² See 'Transforming our world: The 2030 Agenda for sustainable development' A/69/L.85; agreed by Heads of States and High Representatives at the New York Headquarters of the UN at a meeting held on 27-30 September 2015. Available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/69/L.85&Lang=E accessed 2 October 2015.

³ Paragraph 16.3.

⁴ Paragraph 39-46.

⁵ The Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the United Nations Convention Against Corruption.

⁶ U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003)

⁷ It is also commonly believed that the oil giants have been sponsoring opposition to the PIB in Parliament. See for instance 'End the dithering on Petroleum Industry Bill' *The Sun* (22 January 2013).

⁸ This presumably informs part of the preamble to the Universal Declaration of Human Rights which states: 'Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind.'

⁹ Criminal Code Act 1995 (as amended), Part 2, Section 12.1

¹⁰ Section 12.3(2)(c)

¹¹ Section 12.3(2)(d)

¹² *Boimah Flomo et al v Firestone Natural Rubber Co. LLC* No.10-375.

¹³ *Flomo v Firestone*, 9-10.

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